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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 959

PHIL CHADWICK, MRS. PHIL CHADWICK, ABE CHAPMAN AND CHARLEY SCHIFFMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 966

CHARLES BELAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals in No. 959 (R. 931–936) is reported in 117 F. (2d) 902, and its opinion in No. 966 (R. 1043–1047) is reported in 117 F. (2d) 958.[1]

[1] Two separate appeals were taken, one by the four petitioners in No. 959 and the other by petitioner Beland and a co-defendant, the judgment of conviction being reversed as

JURISDICTION

The judgment of the Circuit Court of Appeals in No. 959 was entered February 18, 1941, and its judgment in No. 966 was entered February 27, 1941 (R. 937, 1048). Petitions for rehearing in each case were denied March 20, 1941 (R. 946, 1058). The petition for a writ of certiorari in No. 959 was filed April 17, 1941 and the petition in No. 966 was filed April 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether there was a misjoinder of persons and offenses in the indictment and proof; whether the proof showed several smaller conspiracies in variance to the one general conspiracy charged in the indictment; and whether there was sufficient evidence to support the conviction of petitioner Beland on the conspiracy count.

2. Whether reversible error resulted from the admission of testimony showing that the conspiracy

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to the latter (R. 1048). The appeals were argued separately and the Circuit Court of Appeals rendered two opinions. Both cases are accordingly in this Court on the same District Court record, although a copy thereof is on file in both No. 959 and 966. Each record, however, contains only the Circuit Court of Appeals proceedings in that particular case.

was planned in a penitentiary, that one of the defendants harbored a fugitive co-defendant and adulterated narcotics with poisonous chemicals, and from the prosecutor's summation to the jury.

3. Whether, in the absence of a request, it was error to charge the jury that no inference should be drawn from the failure of any defendant to testify, and whether the charge adequately explained the requisite elements of the conspiracy.

4. Whether the verdict is vague and unintelligible because it enumerates only the counts upon which petitioners were found guilty, and whether two of the petitioners were properly sentenced on Count 42 when the verdict found them guilty on "Counts 7 to 42."

5. Whether an incriminating letter was improperly admitted in evidence because of a proceeding alleged to be pending in some other court on a motion to suppress the evidence.

6. Whether the trial court erred in refusing to recuse himself upon the filing of an affidavit of prejudice which was not certified by affiant's counsel of record as being made in good faith.

STATEMENT

On May 14, 1940, an indictment containing forty-two counts was returned against petitioners and others in the District Court for the Northern District of Texas (R. 2–36). Thirty-four counts [2]

[2] Nos. 1 through 12, 14, 15, 17, 18, 20, 21, 23, 24, 26 through 39.

charged petitioners with transporting and concealing quantities of heroin, knowing the same to have been imported contrary to law, in violation of U. S. C., Title 21, Sec. 124; five other counts [3] charged petitioners with selling, etc., heroin which was not in or from the original stamped package containing such heroin, in violation of U. S. C., Supp. V, Title 26, Sec. 2553 (a); two counts [4] charged petitioners with selling, etc., heroin not in pursuance of a written order of the purchaser, in violation of U. S. C., Supp. V, Title 26, Sec. 2554 (a); and the remaining count, No. 42, charged a conspiracy to violate each of the above sections.

Chadwick and Mrs. Chadwick were convicted on Counts 7 to 42; Schiffman and Chapman were convicted on Counts 1 to 6, inclusive, and 42; and Beland was convicted on Counts 16, 18 and 42 (R. 38–39). The following sentences were imposed: Chadwick, a general sentence of twelve years' imprisonment (R. 82); Mrs. Chadwick, two years' imprisonment on Count 42 and a general sentence of five years' imprisonment on Counts 7 to 41, inclusive, execution of the latter to be suspended and petitioner placed on probation for five years beginning at the expiration of the two-year sentence (R. 84); Schiffman, a gen-

[3] Nos. 13, 16, 19, 22, 25.
[4] Nos. 40, 41.

eral sentence of ten years' imprisonment (R. 87); Chapman, a general sentence of eight years' imprisonment on Counts 1 to 6, inclusive, and two years' imprisonment on Count 42, execution of the latter to be suspended and petitioner placed on probation for five years beginning at the expiration of the general sentence (R. 85); and Beland, a general sentence of five years' imprisonment on Counts 16 and 42 and ten years' imprisonment on Count 18, execution of the latter to be suspended and petitioner placed on probation for a period of five years beginning at the expiration of the five-year sentence (R. 80).[5]

On appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgments of conviction were unanimously affirmed with respect to all petitioners, except Beland (R. 937, 1048). As to him, the judgment of conviction was affirmed on Count 42, the conspiracy count, but was reversed as to Counts 16 and 18, the substantive counts, the Circuit Court of Appeals ordering that he be resentenced accordingly.[6]

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[5] The judgments as to Mrs. Chadwick (R. 84) and Beland (R. 80–81) do not show the suspension of execution of part of their sentences and the grant of probation. Since, however, their notices of appeal (R. 88, 91) and their petitions for writs of certiorari (Chadwick Pet. 5, Beland Pet. 4–5) show such suspension and probation, we assume that the trial judge must have granted the same by orders, separate from the judgments, which were not included in the record.

[6] Imposition of a new sentence is, of course, necessary since the general sentence of five years' imprisonment imposed on

The proof showed the existence of a large narcotic ring having headquarters in New York and Chicago, from which points its operations extended through the South, Southwest, and Middle West. The conspiracy charged had its inception in Leavenworth, Kansas, when Schiffman, Chapman, and another defendant, Sherman, met the codefendants Goldberg, Ross, and Cox, and arranged with the latter to meet them subsequently. Goldberg was told to meet Schiffman in New York when he was released from the penitentiary, and Ross and Cox were to meet Chapman in Texas. Goldberg went to New York and met Schiffman; Ross and Cox went to Fort Worth and Dallas, respectively, and communicated with Chapman, and thereafter all dealt actively in narcotics (R. 107–114, 139–145, 289–292).

Goldberg worked for Schiffman in New York for about three months in the spring of 1938, "cutting" or adulterating from twenty-five to fifty ounces of heroin per week (R. 113–116). Schiffman obtained the narcotics from defendant Cooper (R. 381–382, 394), and introduced Chadwick to Goldberg as his, Schiffman's, partner, who would take care of the drug business while he was out of town (R. 113–115). Schiffman made trips to Chicago, was introduced in that city as the defendant Stobble's part-

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Counts 16 and 42 is in excess of the maximum under the conspiracy statute, on which Count 42 was predicated (U. S. C., Title 18, Sec. 88).

ner, and on one occasion was there with Chadwick (R. 415–420, 426). In Texas contact was made between Chapman, Ross, and Cox in the fall of 1937, Chapman furnishing the two others with heroin on credit (R. 140–144, 291–292). In November 1937, Schiffman was in Texas and accompanied Chapman to Cox's home where he informed the latter that Chapman was working for him and he, Schiffman, would stand back of Chapman's "stuff" (R. 299). Chapman also operated in Chicago; both Ross and Cox went there, met Chapman, and obtained drugs from him (R. 146–149, 295–296). Chapman gave each of them half of a dollar bill to be used as identification by presenting it to the holder of the other half (R. 146–150, 293–294), and told Ross that "they" moved from place to place (R. 293). After Chapman's arrest, Ross went to New York and acquired heroin from defendants Cooper and Weiss, using his half of the bill to identify himself (R. 151–156, 160–162).

When Ross was in New York, Cooper told him that "there would be somebody down [to Texas] in a short time to see [him]," and after Ross returned to Texas, Schiffman made several trips there, in the summer of 1938, delivering narcotics to Ross and Cox and collecting money from them (R. 160–163, 301). In August or September 1938, Chadwick called Ross in Fort Worth and said that "he had been sent down by the boys from New York" and would supply him with whatever "stuff" he needed

(R. 164); and shortly thereafter Schiffman went to Cox's home in Dallas with Chadwick, stating that the latter was taking over his business and that he would stand behind him. Thereafter, Cox acquired narcotics from Chadwick (R. 302–305). Chadwick also supplied Ross with drugs which he sold and paid for from the proceeds (R. 164–169, 223–225). Ross also paid money to Chadwick, which, together with money furnished by other defendants, was used to bribe a narcotic agent for protection (R. 169–176, 310–330). Heroin was "cut" by Chadwick, Mrs. Chadwick, and Ross on Chadwick's premises and was distributed therefrom, and on one occasion Mrs. Chadwick made an airplane trip to New York and brought back drugs (R. 179–189, 249–251, 305–306). She also accompanied her husband on one occasion when he delivered heroin to Mrs. Ross (R. 254–255).

Beland was seen in the company of Chadwick in Fort Worth (R. 718–719), Ross "thought" he saw him at Chadwick's home (R. 306), and there was testimony that Beland "cut" heroin at Chadwick's place (R. 261–262). Ross contacted Beland, asked him to suggest names of purchasers of heroin, and Beland gave him two names, Mr. and Mrs. Blakely. After telling Beland that he was going to New York to get some "stuff" (R. 193–194), Ross contacted the Blakelys, told them that Beland had sent him, and arranged to sell narcotics to them. Ross then made another trip to New York, purchased heroin

from Schiffman, and on his return made sales to the Blakelys (R. 194–200, 493–501). At about this time the Blakelys had written to Beland in regard to buying heroin and had been informed by him that it was selling for $25 an ounce (R. 492–493), and they went to his home and were given shots of heroin (R. 487, 494–497). From the Blakelys, Ross learned of a person in Houston who had a "kilo" (37 ounces) of heroin for sale. He informed Beland thereof, and the latter agreed to finance the deal if Ross would buy it (R. 201–202, 502). When Ross first communicated with Chapman in Fort Worth, Chapman said that he would call Ross the following day as "he was going out to Charlie Beland's" (R. 141). In December 1938, defendant Cooper was arrested in New York and his books were seized (R. 620–622). They contained the names and addresses of many of those involved in this case (R. 625–633), including Beland (R. 627).

ARGUMENT

I

All petitioners, except Beland, contend (1) that there was a misjoinder of persons and offenses in that the indictment charged and the proof showed the commission of a series of unrelated and independent crimes by different defendants; and (2) that there was a fatal variance in that the proof showed several conspiracies instead of the one charged (Chadwick Pet. 24–32); and Be-

land contends (3) that the evidence was insufficient to support his conviction (Beland Br. 19–22). We submit that there is no merit to any of these contentions.[7]

1. The indictment charged all defendants with various substantive offenses against the narcotic laws, and with conspiracy to violate such laws. U. S. C., Title 18, Sec. 557, specifically authorizes the joinder of such counts. There was, therefore, no misjoinder.

2. Petitioners do not deny that the record contains overwhelming evidence that Chadwick, Schiffman, and Chapman are guilty of the substantive counts of which they were convicted.[8]

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[7] The contention that reversible error resulted from the court's failure to order that petitioners be given a bill of particulars (Chadwick Pet. 23–24) requires but little comment. Schiffman and Chapman did not request a bill of particulars, and Chadwick and Mrs. Chadwick merely filed with the United States Attorney a request to be informed "upon what theory" they would be connected with the substantive counts (R. 68). This request, not even addressed to the court, was hardly sufficient to enable anyone to tell what information petitioners desired, but in any event the record shows that it was "overruled in part and sustained in part" (R. 78) without showing anything further. In this state of the record it is too apparent for argument that petitioners may not assert that the trial court abused its discretion.

[8] The Circuit Court of Appeals stated (R. 934) that "the record is replete with uncontradicted evidence which establishes that each of them had a part in the conspiracy, and that they were guilty on the substantive counts of which they stand convicted."

Since the sentences imposed did not exceed that which might properly have been imposed upon them under the substantive counts, it is, as to them, immaterial whether there was a variance between the conspiracy count and the proof (*Evans* v. *United States,* 153, U. S. 608; *Abrams* v. *United States,* 250 U. S. 616, 619; *Claasen* v. *United States,* 142 U. S. 140). Moreover, it is apparent from the statement of facts (*supra,* pp. 6–9 that the Government proved a single general conspiracy to distribute narcotics in which all the petitioners were active and were directly connected with each other, as well as with other conspirators. See *United States* v. *Bruno,* 105 F. (2d) 921 (C. C. A. 2d), reversed on other grounds, 308 U. S. 287. And Mrs. Chadwick was adequately linked to the conspiracy by the testimony that narcotics were "cut" on and distributed from the Chadwick residence, that she assisted in the "cutting," and that she transported narcotics from New York to her residence in Texas.

3. There was ample evidence from which the jury might have inferred that Beland was a member of the conspiracy. He was seen in Chadwick's company; he "cut" heroin on the Chadwick premises; he furnished heroin to addicts; he was closely tied in with coconspirator Ross, giving him names of prospective customers and agreeing to finance him in a proposed purchase of heroin; and his name appeared in the books of coconspirator Cooper in New York. These significant circum-

stances, unexplained by petitioner, clearly warranted the verdict of guilty on the conspiracy count (cf. *United States* v. *Manton,* 107 F. (2d) 834 (C. C. A. 2d), certiorari denied, 309 U. S. 664). The conclusion of the Circuit Court of Appeals that there was substantial evidence of Beland's guilt (R. 1044) followed the like conclusion of the District Court and the verdict of the jury. In the light of this unanimity we submit that he has made no such showing as would require this Court to reexamine the evidence. Cf. *Delaney* v. *United States,* 263 U. S. 586, 590.

II

All petitioners, except Beland, urge that they were prejudiced by the admission of testimony showing that the conspiracy was planned in a penitentiary, that Chadwick had harbored Ross while he was a fugitive and adulterated heroin with poisonous chemicals, and by the prosecutor's summation to the jury (Chadwick Pet. 32–42). However, it is clear that none of these matters affected petitioners' substantial rights.

1. Aaron Goldberg, named in the indictment as a coconspirator, but not as a defendant (R. 25), testified for the Government and stated that during 1937, while he was serving a sentence in the Leavenworth penitentiary, he there met petitioner Schiffman and the defendant Sherman (R. 106–111). The defendant Cox, who also testified for the Government, stated that he saw and conversed

with petitioner Chapman at Leavenworth, Kansas, in 1936 (R. 289–290). Petitioners urge (Pet. 33–34) that this was an attempt by the Government to prove that they were confined in the penitentiary, and was improper because they had not taken the stand and put their reputations in issue. The testimony was offered only for the purpose of showing where the witnesses' conversations took place and not to put in issue the reputations of Schiffman and Chapman (see R. 107, 290).[9] Moreover, in both instances, at petitioners' request, the trial court instructed the jury that there was no evidence that any defendant was in the penitentiary and to disregard any impression to that effect (R. 108, 290). These admonitions accorded whatever protection the petitioners could ask against improper inferences from the evidence in question.

2. There was no error in admitting testimony of Ross, a codefendant who testified for the Government, that Chadwick counseled him and his wife to become fugitives from a prior narcotic case pending against them and harbored them at his farm (R. 175–185), and that heroin which he purchased from Chadwick had been adulterated with poisonous chemicals (R. 225–226). Both incidents were part of the conspiracy. The indict-

[9] Both witnesses were testifying to the inception of the conspiracy. It can hardly be said that the mere fact that a conspiracy is hatched in a prison prevents the Government from proving its origin.

ment from which Ross fled was returned because of sales by him to one Beulah Franks of heroin obtained from Chadwick (R. 173–175), those sales being also charged as offenses in Counts 13–27, and as overt acts in Count 42 of the present indictment (R. 9–17, 32–33). Moreover, the harboring obviously furthered the conspiracy since it was actively continued during the time when Ross was harbored by Chadwick (R. 181–184). And as one of the objects of the conspiracy was to "cut" or adulterate the heroin disposed of by the conspirators (R. 111–112, 225–226), it could hardly have been error to admit evidence that heroin which Chadwick "cut" and disposed of to the co-conspirator Ross was poisonous.[10]

3. Petitioners contend that the summation of the prosecutor entitles them to a new trial (Chadwick Pet. 35–38, Beland Br. 22–24). The court struck from the record and instructed the jury to disregard (R. 857) the prosecutor's remark about keeping a government witness under guard to protect him from the defendants. Moreover, the remark was apparently made in response to argument of defense counsel (see Chadwick Pet. 37). Since

[10] Obviously petitioners were not prejudiced by the redirect testimony of narcotic officer Bell (Chadwick Pet. 35). Not only had the purport of this testimony been previously elicited by the defense on Bell's cross-examination (R. 612), but the court first limited the testimony to the codefendant Green (R. 614) and then at the government's suggestion withdrew the particular statement entirely and instructed the jury not to consider it "for any purpose" (R. 615).

petitioners have not included the defense argument in the bill of exceptions (see R. 859), they are in no position to urge that the prosecutor's statement was prejudicial. *Vause* v. *United States,* 53 F. (2d) 346, 354 (C. C. A. 2nd), certiorari denied, 284 U. S. 661; *Murphy* v. *United States,* 39 F. (2d) 412, 414 (C. C. A. 8th). Petitioners also urge that statements in the summation that the Government's evidence was uncontradicted (Chadwick Pet. 35–36, R. 856) constituted an implied comment on the failure of defendants to testify. But the petitioners do not argue that the situation was such that the contradiction could come only from the defendants themselves.[11] In the light of the evidence and the trial court's charge (see p. 16, *infra*) we think it plain that the summation did not infringe the petitioners' substantial rights.

III

All petitioners, except Beland, contend that two of the instructions to the jury constitute reversible error (Chadwick Pet. 42–45).

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[11] See *Rinella* v. *United States*, 60 F. (2d) 216, 218 (C. C. A. 7th); *Hood* v. *United States*, 59 F. (2d) 153, 155 (C. C. A. 10th); *Jamail* v. *United States*, 55 F. (2d) 216, 217 (C. C. A. 5th); *Slakoff* v. *United States*, 8 F. (2d) 9 (C. C. A. 3rd); *Schwartz* v. *United States*, 294 Fed. 528, 529 (C. C. A. 5th); *Lefkowitz* v. *United States*, 273 Fed. 664, 667–668 (C. C. A. 2d), certiorari denied, 257 U. S. 637; *Shea* v. *United States*, 251 Fed. 440, 445 (C. C. A. 6th), certiorari denied, 248 U. S. 581; *Rose* v. *United States*, 227 Fed. 357, 363 (C. C. A. 8th), certiorari denied, 239 U. S. 647; *Carlisle* v. *United States*, 194 Fed. 827, 830 (C. C. A. 4th).

1. Petitioners urge that in the absence of a request by them, it was improper for the court to charge that the jury, in its deliberations, should not consider the failure of any defendant to testify (R. 972–973).[12] However, it is clear the instruction was given for the defendants' protection pursuant to U. S. C., Title 18, Sec. 832. *Kreuzer* v. *United States,* 254 Fed. 34, 38–39 (C. C. A. 8th), certiorari denied, 249 U. S. 603; *Bruno* v. *United States,* 308 U. S. 287, 292, 294. Since one defendant (Schaffer) had testified (R. 894–942), the instruction was obviously given to forestall the natural comparison which the jury might infer from petitioners' silence. *Kahn* v. *United States,* 20 F. (2d) 782 (C. C. A. 6th); *Becher* v. *United States,* 5 F. (2d) 45, 49 (C. C. A. 2nd); *Robilio* v. *United States,* 259 Fed. 101, 102 (C. C. A. 6th); *Kreuzer* v. *United States,* 254 Fed. 34, 38–39 (C. C. A. 8th), certiorari denied, 249 U. S. 603; *Hanish* v. *United States,* 227 Fed. 584, 587 (C. C. A. 7th).

2. The assertion that the trial judge failed to inform the jury that the acts of one conspirator are binding upon the other conspirators only when the evidence first establishes beyond a reasonable doubt that the conspiracy existed and that the acts are in furtherance of the conspiracy (Chadwick Pet.

[12] The pages of the Chadwick record are mis-numbered following p. 956. Our references to record pages following p. 956 (with the exception of the Circuit Court of Appeals proceedings) are accordingly to the Beland record, which has been corrected.

43–44), is contradicted by the record. After charging on "reasonable doubt" and defining the term "conspiracy" (R. 965–966) the court stated that "After such * * * conspiracy has commenced, the declaration of one conspirator may be taken against every other conspirator * * *. Before the conspiracy begins the declarations made by any one of the parties *are not* admissible * * *" (R. 967). The court twice stated that "When a conspiracy exists it is a general rule that *each conspirator* is criminally responsible for the acts of his associates *in the furtherance of the common design* during the existence thereof" (R. 969). (Italics ours.) Moreover, at the conclusion of the charge, the prosecutor stated that "only such declarations made during the existence of the conspiracy may be considered as are in furtherance of the conspiracy," to which the court replied "I think that is in the charge in at least two places. * * * The jury is so instructed" (R. 976).

IV

Petitioners Chadwick, Schiffman, and Chapman contend that the verdict was too vague and indefinite to protect them from a second prosecution for the offenses involved in some of the counts, and in addition, Mrs. Chadwick asserts that her sentence to two years' imprisonment was imposed on a count under which she was not found guilty (Pet. 45–46).

The first contention is predicated upon the fact

that the verdict as to Schiffman and Chapman, though finding them guilty and not guilty under certain counts, did not mention other counts at all; and upon the theory that the verdict finding Chadwick guilty on "Counts 7 to 42" did not include Count 42 and hence was silent as to it (R. 38–39, 978–979). However, it is well settled that the silence of a verdict as to certain counts of an indictment is equivalent to an acquittal on those counts. *Jolly* v. *United States,* 170 U. S. 402, 408; *Selvester* v. *United States,* 170 U. S. 262, 267–269; *Dealy* v. *United States,* 152 U. S. 539, 542. Hence, Schiffman and Chapman may plead the implied acquittal if they should again be prosecuted for any of the offenses involved in the counts not mentioned in the verdict. And as for a possible second prosecution of Chadwick, clearly he could plead prior conviction since the judgment recites that he was convicted under "Counts 7 to 42, inclusive" (R. 82). Again, even assuming *arguendo* that the general sentence of twelve years' imprisonment on "Counts 7 to 42" (R. 82) erroneously included Count 42 when the verdict did not, the sentence is obviously supported by the other counts. See cases cited, *supra,* p. 11.

Mrs. Chadwick's contention rests on the language of the verdict finding her "not guilty as charged in Counts 1 to 6, inclusive * * * (and) guilty in Counts 7 to 42" (R. 979). She argues that the failure to repeat the word "inclusive" negates a finding of guilty on Count 42.

We think it is plainly evident from the language employed that the jury intended to dispose of the entire indictment as to her by acquitting on the first six counts and convicting on all remaining counts, "7 to 42." The word "to" is to be taken exclusively according to the subject matter (*Union Pacific R. R. Co.* v. *Hall,* 91 U. S. 343, 348), and it is incredible that the jury could have intended to acquit petitioner on the conspiracy count after finding her guilty on thirty-five substantive counts. As was said by the Circuit Court of Appeals (R. 935), verdicts are to be reasonably construed. Moreover, petitioner did not bring this objection to the trial court's attention when the verdict was returned or when sentence was imposed, even though the judgment recites that she was convicted on a verdict of guilty under "counts 7 to 42, inclusive" (R. 84). Obviously, she was well aware of the jury's intention to convict her on Count 42. Cf. *O'Connell* v. *United States,* 253 U. S. 142, 148.

V.

Petitioners contend (Pet. 47, 48) that it was error to admit in evidence a letter written by petitioner Chadwick, because a motion to suppress it as having been illegally seized was pending in another United States District Court.

Petitioners do not appear to urge the illegality of the search, but apparently rest their contention solely upon the proposition that the pendency of

suppression proceedings in another court rendered the letter inadmissible. Petitioners furnish neither reason nor authority [13] for this proposition, and we know of none. Furthermore, the courts below were not furnished with information essential to the consideration of such a question.[14]

VI

Petitioner Beland contends that the trial court erred in rejecting his affidavit of bias and prejudice. The affidavit was subscribed by petitioner "In Propria Persona" and was not "accompanied by a certificate of counsel of record that such

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[13] The cases cited by petitioners (Pet. 48) on illegal search and seizure, are irrelevant to the proposition urged and would be inapplicable for obvious factual differences if the question of the illegality of the search and seizure were here raised. The letter involved (Gov't Ex. 70, R. 824) was taken from the possession of petitioner Charles Schiffman (R. 691). The search was made with Schiffman's permission and cooperation (R. 690–692) and therefore was not "unreasonable." *Cantrell* v. *United States*, 15 F. (2d) 953 (C. C. A. 5th). The question of illegal search and seizure, if raised below, came too late in any event. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Adams* v. *New York*, 192 U. S. 585, 594. And as the letter was assertedly written by Chadwick, there was nothing improper in proving his handwriting by usual methods (Pet. 47).

[14] Petitioners furnish no record references (Pet. 47–48). The record fails to disclose that the alleged proceedings were in fact pending, save perhaps by remarks of counsel (R. 821–823). The identity of neither the court nor the parties to the alleged proceedings is disclosed, nor is there available any data as to the status or duration of the alleged proceedings.

affidavit and application are made in good faith," as required by Section 25 of Title 28 U. S. C.[15] (R. 1027–1032).

The clerk of the trial court having refused to file the affidavit because of non-compliance with the statute, petitioner filed a motion requesting the court to permit it to be filed (Beland, Br. 10). Upon hearing of the motion, petitioner's counsel of record declined to certify that the affidavit was made in good faith, stating that he was "not representing Mr. Beland on that motion" (R. 1038). The court then examined the affidavit, indicated that it "is a complete fabrication, and is false from beginning to end," and "dismissed the affidavit" because of the lack of certificate, petitioner "having a lawyer who does not certify to it" (R. 1037–1041).

It is plain that there was no error in rejecting the affidavit. As the court below held, counsel's certificate "is indispensable and affidavits which are not accompanied by the certificate are insufficient

[15] This section created a new right, nonexistent at common law. See *Ex parte N. K. Fairbank Co.*, 194 Fed. 978, 987–988 (M. D. Ala.); *Ex parte American Steel Barrel Co.*, 230 U. S. 35, and one frequently recognized as being subject to grave abuse, *Berger* v. *United States*, 255 U. S. 22; *Saunders* v. *Piggly Wiggly Corporation*, 1 F. (2d) 582, 585 (W. D. Tenn.); *Morse* v. *Lewis*, 54 F. (2d) 1027, 1032 (C. C. A. 4th); *Cuddy* v. *Otis*, 33 F. (2d) 577, 578 (C. C. A. 8th). The section failed of passage until the provision requiring counsel's certificate was added by a conference committee (Conference Report Relative to the Revision and Codification of the Laws, Sen. Doc. 848, 61st Cong., 3d Sess.).

and may not be filed" (R. 1046). *Cuddy* v. *Otis,* 33 F. (2d) 577, (C. C. A. 8th); *Benedict* v. *Seiberling,* 17 F. (2d) 831, 838 (N. D. Ohio); *Currin* v. *Nourse,* 74 F. (2d) 273 (C. C. A. 8th), certiorari denied, 294 U. S. 729; *Ex parte N. K. Fairbank Co., supra,* at p. 985; *Morse* v. *Lewis,* 54 F. (2d) 1027, 1032 (C. C. A. 4th); *Newman* v. *Zerbst,* 83 F. (2d) 973, 974 (C. C. A. 10th); *Berger* v. *United States,* 255 U. S. 22, 23. The court's further holding that the trial judge properly determined the legal sufficiency of the affidavit,[16] is equally correct. *Berger* v. *United States, supra,* at pp. 32, 36; *Henry* v. *Speer,* 201 Fed. 869, 872 (C. C. A. 5th); *Simmons* v. *United States,* 89 F. (2d) 591 (C. C. A. 5th). Petitioner's contention that because of his lawyer's refusal to certify as to his good faith he was without counsel for the purposes of his affidavit (Pet. 8, Br. 10, 14) is absurd. The record shows that he was represented by counsel of record throughout the proceedings (R. 37, 41), and as the Circuit Court of Appeals said, he cannot "shuttle his coun-

[16] Being clearly insufficient on its face, the question of the sufficiency of the affidavit on its merits did not and does not now arise. The affidavit and motion and a transcript of the proceedings with reference to its filing are set out in full in the Appendix to petitioner's brief in support of his petition for certiorari and appear at 1027–1042 in the record. It seems quite clear, however, as the Circuit Court determined (R. 1046–1047) that it was insufficient. It set forth no matter showing *personal* bias or prejudice. *Henry* v. *Speer, supra; Ex parte N. K. Fairbank Co., supra; Parker* v. *New England Oil Corp.,* 13 F. (2d) 497 (D. Mass.).

sel in and out of the case in order to circumvent the statute" (R. 1046).

CONCLUSION

The decision below is clearly correct, and there is neither conflict of decisions nor any question of general importance. We therefore respectfully submit that the petition for writ of certiorari should be denied.

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MAY 1941.

U. S. GOVERNMENT PRINTING OFFICE: 1941